Supreme Court
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No. 97-1459

In The

Supreme Court of the United States

October Term, 1997

LORILLARD, INC.,

Petitioner,

v.

MILTON HOROWITZ and SHIRLEY HOROWITZ,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioner Lorillard fails to invoke this Court's jurisdiction because it fails to demonstrate that the California Court of Appeal's decision below decided a federal question.

II. Whether Lorillard fails to present an important federal question that either conflicts with other court decisions or must be settled by this Court.

III. Whether the state court properly affirmed the assessment of punitive damages to punish and deter Lorillard, the indistinguishable corporate successor to P. Lorillard, which in the early 1950's fraudulently induced Respondent and millions of other smokers to switch to Kent brand cigarettes with false promises that they were "safe" and "harmless" and offered "health protection," despite P. Lorillard's specific knowledge that the Kent cigarette filters contained and released directly into smokers' lungs the deadliest asbestos in the world.

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JURISDICTION

Respondents Dr. Milton Horowitz and Shirley Horowitz (Horowitz) dispute Petitioner Lorillard, Inc.'s (Lorillard) claim that this Court has jurisdiction over this matter under 28 U.S.C. section 1257. *See* Lorillard's Petition For a Writ of Certiorari (Petition) at p. 1. Lorillard fails to demonstrate that the California courts decided the federal question raised here and thus fails to invoke the jurisdiction of this Court. Accordingly its Petition should be rejected. *See* Reasons For Denying The Writ, Section I, *post*.

STATEMENT OF THE CASE

I. Introduction.

In the early 1950's, Lorillard, one of the United States' major tobacco companies, perpetrated a massive, deadly fraud on Dr. Horowitz and *millions* of other smokers. Lorillard sold "Kent" cigarettes by falsely advertising them as "safe" and "harmless" and offering "health protection," despite Lorillard's specific knowledge that Kent's filters contained and released into smokers' lungs significant amounts of the most deadly type of asbestos in the world. This fraud earned Lorillard countless millions of dollars but cost plaintiff Dr. Horowitz his life due to mesothelioma, an invariably fatal cancer caused only by asbestos.

Lorillard seeks to evade punishment for its fraudulent, deadly scheme by hiding behind a corporate reorganization that changed Lorillard's corporate name from

"P. Lorillard Company" to "Lorillard, Inc." but changed *nothing* else. No California court agreed with Lorillard.

Lorillard now contends that the due process clause of the Fourteenth Amendment prohibits assessment of punitive damages against Lorillard, Inc. for the admittedly punishable misconduct of its *indistinguishable* corporate predecessor, P. Lorillard.

Lorillard's Petition to this Court must be denied for three reasons:

(1) Lorillard fails to invoke this Court's jurisdiction by failing to demonstrate that the state courts decided the federal question raised by Lorillard here.

(2) Lorillard fails to demonstrate that the state court decided an "important" federal question that either conflicts with other law or must be settled by this Court.

(3) The state's imposition of punitive damages against Lorillard satisfied due process because (a) it properly punished Lorillard for the acts of its indistinguishable predecessor and deterred both Lorillard and other companies from similar misconduct in the future, (b) it satisfied every state and federal test cited by Lorillard, and (c) Lorillard's theory that a fraudulent, malicious, and oppressive corporation should be able to avoid punitive damages liability through a simple corporate reorganization is untenable and inconsistent with the fairness implicit in the due process clause.

II. Factual Background.

1. P. Lorillard fraudulently induced Dr. Horowitz to smoke its asbestos-laden Kent cigarettes.

From 1952 to 1956, the P. Lorillard Company placed a deadly filter on its "Kent" brand cigarettes. The filter material, manufactured by co-defendant Hollingsworth & Vose Company (H&V), contained 30% crocidolite asbestos, by far the most toxic, deadly asbestos in the world. RT 874-875, 896-897, 933-994, 996-997, 1513-1515.

P. Lorillard's executives *knew specifically* that these Kent filters released deadly asbestos fibers into the smoke that consumers inhaled into their lungs. Exhs. 42, 42A-BB, 43, 43A-O (Lorillard correspondence admitting asbestos release).

Nevertheless, P. Lorillard mounted an advertising campaign that falsely claimed that the asbestos-laden filters were "safe," "harmless", and offered the "greatest health protection" in history. P. Lorillard *never* informed the public that the filters contained (let alone released) asbestos. *See* Exhs. 16A-M, 17A-L, 18A-J (Kent advertisements that do not mention asbestos); Deposition of advertising executive William Thompson 42:17-43:5; 46:9-10. On the contrary, P. Lorillard boasted that Kent filters contained a "secret mineral" and "an amazing mineral filtering material," without disclosing that the mineral was asbestos. Exhs. 16D, 16E, 185; RT 1961:16-1962:3.

P. Lorillard targeted this advertising at professionals over 30 years old, who assumedly would respond to health claims and be willing to spend extra money for the asserted "health protection." Thompson Depo. 145:9-20.

In 1956, P. Lorillard removed the asbestos from its Kent filters, not out of any concern for its victims, but admittedly for purely economic reasons. Petition at p. 3.

But this change came four years too late for Dr. Horowitz, who in 1952 as a 29 year-old professional psychologist fell prey to P. Lorillard's fraudulent advertising claims, switching to Kents to take advantage of the asserted "health protection." Dr. Horowitz inhaled asbestos from approximately one pack of Kents (20 cigarettes) every day for the next four years. RT 925:18-23, 1112:14-1113:7.

2. P. Lorillard shuffled its corporate form to become Lorillard, Inc.

In 1968, while asbestos from its Kent filters was slowly causing changes in Dr. Horowitz' lungs, P. Lorillard altered its corporate form to merge with defendant Lorillard. Lorillard offered sparse evidence at trial regarding this corporate change:

(1) in 1968, P. Lorillard merged with and into Lorillard;

(2) in 1968, Lorillard became a wholly-owned subsidiary of Loews Theaters, Inc.;

(3) in 1969, Lorillard merged into Loews Theaters, Inc., continuing to operate thereafter as Lorillard, a division of Loews; and

(4) in 1985, Loews Theaters, Inc. changed its name to the present Lorillard, Inc.

RT 2328:15-2329:4.

Lorillard failed to offer any evidence that its ownership, business, or personnel changed *in any way* during these mergers. Lorillard failed to offer any evidence to show that any of the owners of Lorillard or Loews differed from the owners of P. Lorillard. Lorillard does not claim and offered no evidence that any Lorillard entity ever conducted *any* business other than manufacturing and selling cigarettes. As of 1995, Lorillard still manufactured Kents and the following cigarette brands: Harley-Davidson; Heritage; Kent Golden Lights; Kent III; Max; Newport; Newport Lights; Newport Slim Lights; Newport Stripes; Old Gold; Old Gold Lights; Satin; Spring; Style; Style S; Triumph; and True. Companies and Their Brands, Gale (1995 13th ed.) Vol. 2, p. 1551.

3. Asbestos from Lorillard's filters caused a lung cancer that killed Dr. Horowitz.

In 1994 the abnormalities in Dr. Horowitz' lungs caused by asbestos from Kent cigarettes manifested as mesothelioma, an invariably fatal, asbestos-caused cancer of the lung lining that typically manifests 30 to 40 years after exposure to asbestos. RT 524:14-18.

Expert testimony established that asbestos released from Lorillard's Kent cigarette filters caused Dr. Horowitz' mesothelioma, RT 512:15-21, 529:2-5, 927:6-8, 928:18-21, which killed him shortly after trial in 1996.

III. State Court Proceedings.

The Horowitzes sued Lorillard and H&V (and other defendants) in California Superior Court, requesting compensatory and punitive damages. CT 1-18.

The jury found both H&V and Lorillard liable on every cause of action submitted to it – negligence, three forms of strict products liability, and fraud – and awarded Horowitz $1.3 million in compensatory damages. CT 1585-1594. The jury also found that both Lorillard and H&V committed "malice, oppression or fraud" and accordingly assessed punitive damages of $560,000 against Lorillard and $140,000 against H&V. CT 1713-1715.

The California Court of Appeal affirmed the judgment against H&V and Lorillard and H&V in all respects. Petition, Appendix at pp. 1a-36a. The California Supreme Court denied discretionary review of the appellate court decision. Petition, Appendix at p. 39a.

REASONS FOR DENYING THE PETITION

Lorillard seeks to avoid punishment for killing Dr. Horowitz by hiding behind its corporate reorganization that changed its corporate name from "P. Lorillard Company" to "Lorillard, Inc." but changed *nothing* else.

By failing in its Petition to challenge the jury's finding, Lorillard concedes that P. Lorillard's grievous misconduct in fraudulently marketing deadly, asbestos-laden cigarettes to Dr. Horowitz as "safe" and offering "health protection" was malicious, oppressive, and fraudulent

and thus merited punitive damages in California. *See* Cal. Civil Code § 3294 (punitive damages standards).

Instead Lorillard contends – in the guise of a due process argument – that this punitive damage liability should have vanished simply because P. Lorillard merged into Lorillard in 1968.

This Court should deny Lorillard's Petition for three reasons: (1) Lorillard fails to invoke the jurisdiction of this Court by failing to demonstrate that the state court of appeal decided the federal question it asserts here; (2) Lorillard fails to demonstrate that the state court decided an important question of federal law that either conflicts with other decisions or must be settled by this Court; and (3) due process did not prohibit the jury's assessment of punitive damages against Lorillard, Inc. for the heinous, deadly fraud perpetrated by its indistinguishable predecessor.

I. LORILLARD HAS FAILED TO INVOKE THE JURISDICTION OF THIS COURT.

First, this Court should reject Lorillard's Petition because Lorillard has failed to invoke this Court's jurisdiction.

Lorillard claims jurisdiction over the "decision of the Court of Appeal of California" under 28 U.S.C. section 1257. Petition at p. 1.

Section 1257, however, authorizes this Court to review the final judgment of a state court only when that judgment *decides* a substantial federal question.

Lorillard bore the burden of *invoking* this Court's jurisdiction by *showing* in its Petition that the California courts decided the federal question that it asserts here. Under this Court's Rules, Lorillard had to meet this burden by specifying in the "Statement of the Case" of its Petition (1) the "stage in the [state] proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were *raised*," (2) the method or manner of raising them and the way in which they were passed on by those courts, and (3) "pertinent quotations of specific portions of the record . . . , with specific reference to the places in the record where the matter appears, so as to *show* that the federal question was *timely and properly raised* and that this Court *has jurisdiction* to review the judgment on a writ of certiorari." Supreme Court Rule 14.1(g)(i) (emphasis added).[1]

Under these rules, Lorillard has failed to invoke the jurisdiction of this Court. Although Lorillard raises, as the purported federal question, that the "imposition of punitive damages without proof of independent wrongdoing by a successor corporation violates due process principles announced by this Court," Petition at pp. 21-24, Lorillard completely fails to show that either (1) the California Court of Appeal *decided* this federal question or (2) Lorillard properly *raised* this federal question in the court of appeal or the trial court.

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[1] All further references in this Opposition Brief to "Rule" are to the Supreme Court Rules unless specified otherwise.

First, the state court did not decide Lorillard's asserted federal due process question.

Lorillard contends that "[i]n rejecting Lorillard, Inc.'s due process challenge, the Court of Appeal noted the existence of a conflict of authority on the issue." Petition at pp. 9-10.

On the contrary, the only "due process" question resolved by the Court below was whether there was substantial evidence to support the jury's finding that Lorillard committed "malice, oppression, or fraud." Petition, Appendix at p. 24a (Lorillard "argue[d] that there is no substantial evidence of its wrongdoing to support an award of punitive damages, and consequently the punitive damage award violates the federal due process clause."); p. 27a ("Finally, the punitive damage award against Lorillard does not violate due process because . . . there is substantial evidence of Lorillard's wrongdoing to support the punitive damage award.").

The state court *did not* discuss whether an assessment of punitive damages against a successor corporation for the misconduct of its predecessor violates due process. The state court discussed Lorillard's contention that punitive damages were "improper" because Lorillard was a successor corporation *separately* from its brief "due process" discussion. Petition, Appendix at p. 24a. Moreover, the asserted "conflict" discussed by the court below regarded whether punitive damages liability passed to corporate successors under California's statutes governing corporations and did not involve due process. Petition, Appendix at pp. 25a-26a.

Second, Lorillard fails to show that it raised its due process question below.

Because the state court failed to rule on Lorillard's asserted federal due process question, this Court cannot take jurisdiction over Lorillard's Petition unless Lorillard showed that it properly *raised* the question in the state courts. *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354 (1969) (Where a state court fails to pass upon the federal question asserted by the Petitioner, this Court *"assume[s]* that the omission was due to want of proper presentation in the state courts," unless the Petitioner "can *affirmatively show* the contrary."); *see Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S.Ct. 66 (1945).

Under Rule 14, Lorillard could have demonstrated that it raised its due process question with "pertinent quotations" in its Statement of the Case and attachments in its Appendix *"so as to show* that the federal question was timely and properly raised and that this Court has jurisdiction." Rule 14.1(g)(i) (emphasis added).

Lorillard makes no such showing. Instead, Lorillard merely claims that it raised its due process issue in the trial court, Petition at p. 7, and in the court of appeal. Petition at p. 9. This Court thus assumes that Lorillard's failure to raise properly its asserted federal due process question was the reason why the court of appeal did not rule on the question.

In sum, the state courts below did not decide the federal question asserted by Lorillard here, and because Lorillard failed to show that it raised the federal question in the courts below, this Court is without jurisdiction and accordingly should reject Lorillard's Petition.

II. LORILLARD HAS FAILED TO DEMONSTRATE A "COMPELLING REASON" WHY THIS COURT SHOULD GRANT CERTIORARI.

Respondent has demonstrated that this Court does not have jurisdiction over Lorillard's Petition.

If this Court disagrees and takes jurisdiction, it should deny the Petition because Lorillard has failed to show a "compelling reason" why this Court should grant certiorari. *See* Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

Lorillard fails to establish either of the bases for a grant of certiorari from a state court decision: (1) the state decision "decided an important federal question in a way that conflicts" with a decision of either this Court, a United States court of appeals, or another state court of last resort, or that (2) the state decision raises an "important question of federal law" that this Court must settle. *See* Rule 10(b) and (c). For lack of either of these grounds, review by this Court is not warranted.

A. Lorillard has failed to demonstrate that the state court decision decided Lorillard's asserted federal question in a way that conflicts with decisions of this Court, the United States court of appeals, or any other state's court of last resort.

Lorillard has failed to establish that the decision below "conflicts" with other decisions on Lorillard's asserted federal due process issue.

Lorillard erroneously asserts that several federal and state courts, including the state court below, have held that assessing punitive damages against a successor corporation for the misconduct of its predecessor based on the "form" of the corporate merger *is consistent with the due process clause*, and that several state and federal courts have held this practice *inconsistent with due process*. Petition at p. 5. In truth, only one of 18 cases cited by Lorillard in support of this proposition even *mentioned* due process, and that case is consistent with the decision below.

Lorillard attempts to demonstrate its asserted "conflict" over the application of due process by showing a purported "split" in authority among the state and federal courts "regarding the circumstances in which an innocent successor of a corporate wrongdoer may properly be assessed punitive damages." Petition at p. 13.

Lorillard cites 18 federal and state cases in an attempt to demonstrate this purported "split" in authority. However, in seven of these 18 cases, the courts held that the successor assumed the punitive damages liabilities of its predecessor either expressly in the corporate merger agreement or under the relevant jurisdiction's corporate merger statute.[2] *See* Petition at pp. 17-19 and n.5. In the

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[2] *E.g., Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1094-1095 (5th Cir. 1991) (surviving corporation after merger assumes predecessor's liabilities under Texas law, and successor expressly assumed all "debts, liabilities and duties" of predecessor); *see Douglas v. Bank of New England/Old Colony*, 566 A.2d 939, 941-942 (R.I. 1989) (merger agreement and statute); *Celotex Corp. v. Pickett*, 490 So.2d 35, 37-38 (Fla. 1986) (merger

other 11 cases, the courts did not rely on a merger agreement or statute but analyzed the particular facts as allowing punitive damages in some cases[3]

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statute); *Man v. Raymark Industries*, 728 F.Supp. 1461, 1468-1471 (D.Hawaii 1989) (merger agreement and statute); *Krull v. Celotex Corp.*, 611 F.Supp. 146, 147-149 (D.C.Ill. 1985) (merger agreement and statute); *Wall v. Owens-Corning Fiberglas Corp.*, 602 F.Supp. 252 (N.D.Tex. 1985) (merger agreement); *Hanlon v. Johns-Manville Sales Corp.*, 599 F.Supp. 376, 377-379 (1984) (merger agreement).

[3] *See Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1215 n.27 (6th Cir. 1988) (factual finding that successor was not "innocent" because it had not adduced evidence of changed ownership or changed industry practices); *Davis v. Celotex Corp.*, 420 S.E.2d 557, 564-565 (W.Va. 1992) (affirming punitives against successor based on factual finding that successor continued to sell predecessor's defective product); *Wussow v. Commercial Mechanisms, Inc.*, 293 N.W.2d 897, 906-907 (Wis. 1980) (court did not even analyze successor liability for predecessor's acts, finding instead that successor itself engaged in "willful, wanton, or reckless" conduct); *Martin v. Johns-Manville Corp.*, 469 A.2d 655 (Pa.Super. 1983) (under Pennsylvania law, punitives may be assessed against successor after "case-by-case" analysis of whether successor and predecessor have a "degree of identity" making punishment and deterrence appropriate); *Brotherton v. Celotex Corp.*, 493 A.2d 1337 (N.J.Super.L. 1985) (factual finding of sufficient "degree of identity" between successor and predecessor to defeat successor's summary judgment motion); *Sheppard v. A.C. & S. Co., Inc.*, 484 A.2d 521 (Del.Super. 1984) (holding that in Delaware each case of successor liability for punitive damages "must turn on its particular facts" and denying successor's summary judgment motion under evidence presented); *Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357, 391 (1982) (stating without analysis that successor corporations are responsible for punitive damages liability of predecessors); *City of Richmond, Va. v. Madison Management Group*, 918 F.2d 438, 456 (4th Cir. 1990) (affirming punitive damages against successor to further

but not in others.[4] *See* Petition at pp. 13-16 and n.2.

Lorillard then contends without analysis that some of these cases treated the "due process challenge" asserted by Lorillard here as a "matter of notice." Petition at p. 17.

In this contention, Lorillard errs because 17 of these 18 cases *do not discuss* due process whatsoever, let alone consider a "due process challenge."[5] Thus Lorillard fails to demonstrate that the state court below "decided an important *federal question* in a way that conflicts" with these 17 decisions, and hence under Rule 10 review is not warranted.

The only case cited by Lorillard that even mentions due process is *Douglas*, in which the Rhode Island Supreme Court affirmed an assessment of punitive damages against a successor bank because the controlling statute governing "merger of national banks" mandated that the successor bank "shall be liable for all liabilities" of the predecessor bank. *Douglas, supra*, 566 A.2d at 941

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general deterrence and to prevent predecessor from evading punitive liability by changing corporate form).

[4] *See Drayton v. Jiffee Chemical Corp.*, 395 F.Supp. 1081, 1097-1098 (N.D.Ohio 1975) (factual determination that successor's immediate change in defective product and corporate policies made punitive damages inappropriate); *Bowen v. W.R. Grace & Co.-Conn.*, 781 F.Supp. 682, 683 (D.Mont. 1991) (holding without analysis that successor liability does not extend to punitive damages in Montana); *In re Related Asbestos Cases*, 566 F.Supp. 818, 823 (N.D.Cal. 1983) (factual finding that successor had established "separateness" from predecessor).

[5] *See* all cases cited in footnotes 2, 3, and 4, *ante*, except *Douglas*, 566 A.2d at 939.

(emphasis deleted) (*quoting* 12 U.S.C.A. § 215a.(a) (West 1989)). The lawsuit seeking punitive damages against the predecessor "had been instituted long before the merger," and thus the successor had notice of the potential for punitive damages liability when it merged with the predecessor. *Id.* at 942. The court noted that the successor had raised a "due process argument under the United States Constitution" but held that the successor's punitive damages liability was "a matter of voluntary assumption of liability and [thus did] not implicate . . . the due process clause of the Federal Constitution." *Id.*

The state court decision below does not conflict with *Douglas* on Lorillard's asserted federal due process issue. As in *Douglas*, the court below applied the punitive damages liability of the predecessor (P. Lorillard) to the successor (Lorillard) because the successor assumed these liabilities under the applicable merger statute. Petition, Appendix at pp. 25a-27a. As in *Douglas*, the court below (if it ruled on due process) found that Lorillard voluntarily assumed P. Lorillard's liabilities when they merged, and thus that due process was not implicated. Petition at p. 27a.

Lorillard thus fails to demonstrate that the decision below conflicts with any other authority in deciding a federal question, so that under Rule 10 review is not warranted.

B. Lorillard fails to demonstrate that the *unpublished* state court decision raises an "important question of federal law" that this court must decide.

This Court should deny Lorillard's Petition because Lorillard fails to demonstrate – and does not even contend – that the state court decision below raises an "important question of federal law" that this Court must decide. *See* Petition at pp. 1-28.

To warrant review by this Court, a federal question must be important "to the public as distinguished from" the particular "parties." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422 (1923). The state court decision here, however, is important *only* to these parties because it an *unpublished* opinion. Petition, Appendix A at p. 1a. In California, appellate court decisions that are not published may not be "cited or relied on" in "any other action." Cal. Rule of Court 977(a). The unpublished decision below therefore has *no effect* on any other litigation anywhere.

Lorillard thus fails to raise an "important question of federal law" that this Court must settle, and under Rule 10 this Court should deny Lorillard's Petition.

III. THE COURT OF APPEAL PROPERLY AFFIRMED THE JUDGMENT AGAINST LORILLARD.

Respondent has demonstrated that (1) this Court does not have jurisdiction over Lorillard's Petition, and (2) Lorillard has failed to demonstrate a compelling reason why this Court should grant certiorari.

If this Court disagrees, it should still deny Lorillard's Petition because the court below properly affirmed the assessment of punitive damages against Lorillard for three reasons: (1) the punitive damages award furthered both punishment of Lorillard and deterrence of Lorillard and other companies, (2) punitive damages were appropriate against Lorillard under every federal and state case cited by Lorillard, and (3) Lorillard's position that a malicious and fraudulent corporation should be able to avoid punitive damages through corporate reorganization is untenable.

A. The punitive damages award against Lorillard accomplished both punishment of Lorillard and deterrence of Lorillard and similar companies.

Lorillard contends that the punitive damages award below violated due process because it served neither goal of punitive damages, punishment or deterrence of wrongdoing. Petition at p. 5. On the contrary, the punitive damages award was proper and comported with due process because it served both punishment and deterrence.

First, the punitive damages properly punished Lorillard, the exact same company as P. Lorillard. As set forth above, Lorillard made no attempt to distinguish itself from P. Lorillard and failed to show that the corporate reorganization did *anything* but change the company name from P. Lorillard to Lorillard, Inc. Lorillard offered no evidence that P. Lorillard's ownership, directors, officers, corporate practices, or products changed in any way

after the merger. Lorillard offered no evidence that either P. Lorillard or Lorillard has ever engaged in any business practice except selling Kent and other cigarettes. In short, Lorillard is the exact same company selling the exact same products as P. Lorillard. Lorillard fails to show how punishing P. Lorillard would differ from punishing Lorillard. Hence, the court below properly found substantial evidence of Lorillard's wrongdoing to support the punitive damages award. Petition, Appendix at p. 27a.

Under similar circumstances, the Wisconsin Supreme Court sanctioned punishment of a successor corporation for its predecessor's misconduct. "The defendants contend that, because [the predecessor had been dissolved and the defective product was no longer made], no societal purpose would be served by punishing the defunct corporation for having once produced dangerously defective [products]. While punitive damages have as one purpose the deterrence of similar future outrageous conduct, they also, as the very name suggests, are intended to punish past conduct. Nothing in [the defendant's] argument poses a rational basis for concluding that there should not be . . . punitive damages imposed when there has been past willful, wanton, or reckless conduct." *Wussow, supra,* 293 N.W.2d at 907.

Second, the imposition of punitive damages deterred both Lorillard and other companies from engaging in similar misconduct in the future.

Lorillard claims that since 1956 it has had "no thought" of repeating its fraudulent conduct of selling asbestos-laden cigarettes as "safe." Petition at p. 5. This

claim is dubious at best, as Lorillard admits that it stopped placing deadly asbestos in its cigarettes "for economic reasons," Petition at p. 3, and not from compassion or remorse for its victims. The jury could have reasonably inferred from this evidence that Lorillard would place asbestos or any other deadly substance back in its filter if it benefitted Lorillard economically. The punitive damages award thus properly deters Lorillard from similar future misconduct.

Moreover, the assessment of punitive damages properly deters other companies from engaging in similar misconduct. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267, 101 S.Ct. 2748 (1981); *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 241 Cal.Rptr. 67, 43 Cal.3d 1379, 1387 (1987). In the Fourth Circuit, a defendant similarly sought to avoid punitive damages because it was a successor that no longer committed the misconduct of its predecessor. The court held that the "deterrence value" of punitive damages applied when assessed against "a successor in interest who no longer commits the wrongful act sanctioned by the award [because] the purpose of a punitive damage award is not simply to deter the wrongdoer from future wrongdoing; it is to display to others an example of the consequences they may expect if they engage in similar conduct." *City of Richmond, Va. v. Madison Management Group*, 918 F.2d 438, 456 (4th Cir. 1990) (emphasis and quotation marks deleted); *see F.B.C. Stores, Inc. v. Duncan*, 198 S.E.2d 595, 599 (Va. 1973) (punitive damages provide deterrence value "to others").

Allowing Lorillard to avoid punitive damages here would have the opposite effect from deterrence, *encouraging* similar misconduct. Lorillard's egregious misconduct

in the early 1950's subjected countless Kent smokers to mesothelioma and other asbestos-caused diseases that manifest only after a long latency period of 30 to 40 years. Lorillard seeks to take advantage of this latency period by arguing 40 years after its misconduct, when the diseases are killing its victims, that it has stopped placing asbestos in its filters and thus there is no misconduct to deter. If this Court were to sanction Lorillard's argument that the punitive damages here serve no deterrence function, it would send the message to other companies that they can safely engage now in a lucrative business practice that has dangerous or deadly effects that do not manifest until years later.

The imposition of punitive damages against Lorillard properly sent a message of deterrence, demonstrating that a company that callously subjects consumers to deadly substances for its economic gain *will* be punished.

B. The punitive damages assessed against Lorillard satisfied every test set forth in the federal and state cases cited by Lorillard.

The court below properly affirmed the punitive damages award against Lorillard under every test cited by Lorillard, on both sides of its purported "split" in authority.

First, the decision below followed the rationale of those cases in which successor liability rested on a corporate merger statute passing the predecessor's liability to the successor. The court below relied on Cal. Corp. Code section 1107, which provides that the surviving corporation in a merger "shall be subject to all the debts and

liabilities of [both merging corporations] as if the surviving corporation had itself incurred them." Petition, Appendix at p. 25a. The decision below is thus in accord with *Glasscock, Douglas, Pickett, Man,* and *Krull.* See fn. 2, *ante,* for citations.

Second, the decision below followed the rationale of the Sixth Circuit, which reviews the facts to determine whether the successor corporation demonstrated that it was "distinct" from its predecessor. For example, in *Drayton* the Sixth Circuit affirmed the denial of punitive damages because the successor corporation *demonstrated* that it was distinct from its predecessor in both ownership and corporate practices. *Drayton, supra,* 591 F.2d at 366, 395 F.Supp. at 1097-1098. By contrast, in *Sterling* the Sixth Circuit rejected a successor's argument that it could not be assessed punitive damages under *Drayton* because the successor had provided no evidence that the predecessor's ownership or corporate practices had changed. Here, Lorillard also failed to present *any* evidence that P. Lorillard's management or corporate practices changed in any way when it merged with Lorillard. The decision below is thus consistent with the Sixth Circuit approach.

Third, the decision below is consistent with the approach taken by the federal District Court in *Related Asbestos Cases,* in which the federal court declined to assess punitive damages because the successor "demonstrated that it is not a mere continuation" of the predecessor. *Related Asbestos Cases, supra,* 566 F.Supp. at 823. The federal court distinguished the California Court of Appeal decision in *Moe v. Transamerica Title Ins. Co.,* 98 Cal.Rptr. 547, 21 Cal.App.3d 289 (Cal.Ct.App. 1971), in which the successor had "*made no attempt* to establish its

separateness from the original entity" and thus was properly held liable for punitive damages. Here, Lorillard also made no attempt to establish its separateness from P. Lorillard, and thus the decision below affirming punitive damages is consistent with the approach taken by the court in *Related Asbestos Cases*.

C. Lorillard's theory that a malicious, fraudulent, and oppressive corporation should be able to avoid punitive damages liability through corporate reorganization is untenable.

Lorillard urges this Court to allow a corporation to avoid punitive damages liability for its intentional misconduct by merely reorganizing under another corporate name. Due process considerations do not compel such baseless exoneration.

Although P. Lorillard changed its name to Lorillard, Inc. through a series of mergers, it continued in the exact same business throughout – manufacturing and selling Kent (and other) cigarettes. Hence, Lorillard is hardly the innocent successor corporation that it purports to be. Petition at p. 23 ("Lorillard, Inc. has done nothing wrong.").

Lorillard claims that when it merged with P. Lorillard in 1968, it had no reason to believe that the "asbestos-containing filter would result in product liability actions [or a] punitive damages award." Petition at p. 26. On the contrary. When the companies merged Lorillard knew or should have known specifically that P. Lorillard's Kent filters had released deadly asbestos into the lungs of smokers.

First, Lorillard's files contained reams of correspondence among P. Lorillard executives admitting that 1950's testing had proven repeatedly that the deadly asbestos in the filters was released during smoking. Exhs. 42, 42A-BB, 43, 43A-O.[6]

Second, as Lorillard's own expert Dr. First admitted, the hazards of asbestos have been "well known" since the 1930's. RT 1687:1-8. In 1947, the American Conference of Governmental Industrial Hygienists called for decreasing limits for industrial exposure to asbestos. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1084 (5th Cir. 1973). In 1949, the Journal of the American Medical Association published an editorial entitled "Asbestosis and Cancer of the Lung," pointing out the relationship between asbestosis and cancer of the lung and recommending "increased attention to this probable occupational hazard of cancer of the lung. . . . " Exh. 137; RT 1958:1-1959:12.

Thus, Lorillard cannot reasonably claim to have been ignorant of the fact that the business it was acquiring had placed a fatal substance directly into smokers' lungs.

Yet Lorillard contends – in the name of due process – that P. Lorillard's punitive damages liability should have just disappeared in 1968 simply because P. Lorillard

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[6] Thus Lorillard's concern that a successor corporation can be surprised by punitive damages if the "target corporation succeeds in hiding its potential liabilities from the acquiring corporation," Petition at p. 25, has no application here.

merged with Lorillard. On the contrary, a successor corporation should not be able to "jettison [the predecessor's] inchoate liabilities into a never-never land of transcorporate limbo." *Celotex Corp. v. Pickett, supra,* 490 So.2d at 38 (*quoting Wall, supra,* 602 F.Supp. at 255).

Lorillard attempts to characterize this as a "straw man" argument, contending that any corporation that merges with another corporation solely to "avoid punitive liability for wrongdoing" could still be assessed punitive damages. Petition at p. 18 n.3. This suggestion of an "intent" test for assessing punitive damages against corporate successors leaves a loophole not warranted by due process. Lorillard's argument fails because, by its own admission, corporations do not change form merely to avoid liability, but rather a "wave of corporate acquisitions and mergers has dominated the American economy during the last two decades." Petition at p. 11. Under Lorillard's scheme, any liable corporation that changes form as a matter of business practice – which Lorillard admits is commonplace – would automatically have its punitive liability vanish. Due process fairness considerations cannot demand such a result. See *City of Richmond, supra,* 918 F.2d at 456 (acknowledging the "undesirability of allowing an entity to escape liability for punitive damages by transferring its assets to another entity").

In addition punitive damages are proper against Lorillard now because Lorillard *benefitted* from the long latency period of mesothelioma when it merged with an overvalued P. Lorillard. If Lorillard's asbestos-laden Kents had caused Dr. Horowitz' disease to manifest in the early 1950's, P. Lorillard would have been subjected to punitive damages at that time. Lorillard then would have

received in the 1968 merger a P. Lorillard corporation with assets already diminished by the punitive damage award that would have been paid. But because the mesothelioma caused by P. Lorillard's wrongful conduct has a long latency period, Lorillard received P. Lorillard's assets undiminished by the payment of damages for Dr. Horowitz' injuries. Hence, contrary to Lorillard's contention, no unfairness arises from the fact that punitive damages have now been assessed, a punishment that P. Lorillard escaped earlier only because of the long latency period for mesothelioma.

Finally, Lorillard's argument that the present management and owners of Lorillard "had no control over the individuals who were guilty of the allegedly wrongful conduct,"[7] Petition at pp. 23-24, is based not on a corporate merger but rather on the passage of time – due to mesothelioma's long latency period – between P. Lorillard's egregious misconduct and Dr. Horowitz' disease and resulting lawsuit. Lorillard effectively argues that, even if P. Lorillard had never changed its corporate form, its present managers and owners should not be punished for the misconduct of its past managers.

The inequity of this claim was exposed by the court in *Man, supra,* 728 F.Supp. at 1470, which recognized that the "true deterrent and retributive effect of punitive damages [on a corporation] is often felt by persons having

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[7] Lorillard's continuing characterization of its fraudulent misconduct as "allegedly wrongful" seems improper in light of the judgment below encompassing a jury finding, affirmed by the trial court (on new trial motion) and appellate court, that Lorillard committed fraud, negligence, malice, and oppression.

nothing to do with the tortious conduct" because "stockholders and even management may have changed (*as undoubtedly occurs in a large corporation*) between the time of the performance of the outrageous acts and the imposition of liability." *Id.* (emphasis in original). The *Man* court thus rejected the defendant's contention (and Lorillard's here) that assertedly "innocent" corporate managers and owners who did not commit the wrongdoing personally are "immune from the effects of punitive damages committed at an earlier date in corporate history." *Id.* Rather, it is perfectly appropriate that the "deterrent and retributive effect" of punitive damages for a predecessor corporation's past misconduct "pass to new owners along with the corporate shell." *Id.*

Thus the assessment of punitive damages against Lorillard does not raise a due process issue. The court below correctly affirmed the punitive damages award against Lorillard, and accordingly this Court should deny Lorillard's Petition.

CONCLUSION

In a final attempt to avoid punishment for its appalling misconduct in fraudulently inducing millions of unwitting Kent smokers to inhale a steady stream of asbestos directly into their lungs, the corporation now known as Lorillard constructs a due process "fairness" argument that is not supported by the evidence or the law.

Lorillard's Petition should be denied because (1) this Court does not have jurisdiction over Lorillard's purported federal due process question because the state court below did not decide it, (2) there is no conflict among the circuits and state courts on Lorillard's purported federal question, and (3) the courts below properly – and consistent with due process – ignored a minor change in corporate formalities to assess punitive damages to punish Lorillard and deter both Lorillard and other companies from exchanging the health and lives of consumers for short-term monetary gain.

Accordingly, the Horowitzes respectfully request that this Court deny Lorillard's Petition.

Dated: April 6, 1998.

Respectfully submitted,

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